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No. 93-1276

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

BRUCE ROY LEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent argues (Br. in Opp. 4-6) that the petition for certiorari is untimely because it was not filed within 90 days after the court of appeals order of August 14, 1991.[1] However, the text of Supreme Court Rule 13.4,

[1] The court of appeals panel entered its judgment on June 10, 1991, affirming respondent's conspiracy conviction under Count I but reversing his conviction under Count III for violation of 18 U.S.C. 844(h). Respondent filed a timely petition for rehearing with suggestion for rehearing en banc, contending that the panel had erred in rejecting his First Amendment challenge to his conviction on Count I. The United States opposed the petition but asked the court of appeals to review the panel's reversal of the Count III conviction if it decided to rehear the case. Lee Pet. App. A4. On August 14, 1991, the Eighth Circuit granted rehearing en banc "as to Count I only" and vacated the panel opinion and judgment "as it pertains to Count I." Lee Pet. App. A18. The judg-

the precedents of this Court, and sound principles of judicial administration all indicate that the petition was timely filed.

a. Rule 13.4 of the Rules of this Court states that "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." In the present case the court of appeals granted rehearing en banc and entered a "subsequent judgment" in the case on October 7, 1993. Pursuant to Rule 13.4, the time for any party to file a petition for certiorari runs from that date.[2]

b. As this Court's precedents make clear, this analysis is not altered by the fact that the grant of rehearing did not encompass the issue raised in the government's

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ment of the court of appeals on rehearing en banc was entered on October 7, 1993. The government's petition for a writ of certiorari is addressed to the panel's June 10, 1991, ruling with respect to Count III of the indictment. See Pet. 5-6 n.2. For the reasons stated *infra*, we believe that the time for filing a petition for certiorari runs from October 7, 1993, the date of the "entry of a subsequent judgment," Supreme Court Rule 13.4, by the en banc court of appeals.

[2] Rule 13.4 expressly provides that the filing of a rehearing petition by one party shall toll the time for all parties to seek review in this Court. We assume (and the text of the Rule gives no reason to doubt) that this principle applies "regardless of whether the other parties would raise the same or different issues as raised in the petition for rehearing." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 286 (7th ed. 1993). If so, there is no reason that tolling should stop when a court of appeals determines to rehear an aspect of the case en banc but before it has entered a judgment on rehearing.

petition for certiorari. In *Washington* v. *Confederated Tribes*, 447 U.S. 134 (1980), the Court considered the analogous question "whether a motion for partial new trial renders nonfinal the District Court's holding on *all* issues between the parties, or merely renders nonfinal the disposition of those issues actually raised in the new trial motion." 447 U.S. at 149. The Court concluded that "the filing of a motion for partial new trial in these circumstances must have rendered nonfinal the disposition of all issues between the parties," *id.* at 150, and that the time for filing a direct appeal to this Court was therefore tolled during the pendency of that motion. See also *Missouri* v. *Jenkins*, 495 U.S. 33, 46 (1990).[3]

c. Finally, to interpret Rule 13.4 in the manner that respondent suggests would disserve this Court's interest in sound judicial administration. A rule that would force litigants to seek review in this Court while other aspects of the case were pending in the court of appeals "would serve no useful purpose," *Confederated Tribes*, 447 U.S. at 150, but instead would perversely encourage piecemeal litigation.[4] Nor is there merit to respondent's

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[3] Our construction of Rule 13.4 is also consistent with the principle that "[a] petition for writ of certiorari can expose the entire case to review." *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988). Thus, a petition for certiorari to review a court of appeals judgment can bring before this Court issues decided at a prior stage of the litigation—including earlier rulings that might have been (but were not) reviewed by this Court when they were issued. See *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 365-366 n.1 (1973).

[4] Alternatively, respondent's interpretation of Rule 13.4 could encourage parties seeking rehearing in the court of appeals on one issue to seek rehearing on other issues as well solely to preserve their right to petition for review in this Court. See *Confederated Tribes*, 447 U.S. at 150.

suggestion that the government "could have avoided 'splitting' the case by making a motion to stay the appellate court proceedings while it made a timely petition to the United States Supreme Court." Br. in Opp. 5-6. There is no assurance that the court of appeals would have granted such a motion, and it is not clear that this Court could have exercised its certiorari jurisdiction under these circumstances. See *Jenkins*, 495 U.S. at 46 ("while the petition for rehearing is pending, there is no 'judgment' to be reviewed"). In any event, this Court's decision whether to review one aspect of a case can most intelligently be made after the court of appeals has resolved all outstanding issues.[5]

2. In our petition for a writ of certiorari in this case, we recommended that the petition be held pending disposition of the petition for certiorari filed in *Hayward* v. *United States*, No. 93-1063. In the alternative, we suggested that the Court grant the petition, vacate the judgment of the court of appeals panel as to Count III of the indictment, and remand for further consideration in light of *Smith* v. *United States*, 113 S. Ct. 2050 (1993). On March 28, 1994, the Court denied the petition for certiorari filed in *Hayward*. We therefore suggest that the

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[5] To interpret Rule 13.4 in the manner that respondent suggests would be particularly inadvisable in cases such as the present one. Respondent's conviction under Count III for violation of 18 U.S.C. 844(h)(1) is "inextricably linked," *United States* v. *Adams*, 383 U.S. 39, 41-42 (1966), to his conviction under Count I for conspiring to threaten or intimidate individuals in their exercise of federally guaranteed rights in violation of 18 U.S.C. 241. Section 844(h)(1) provides a penalty for those who have used fire in the commission of a federal felony; in this case the federal felony is Section 241. Thus, until the court of appeals rendered its final judgment on Count I, any review of the panel's judgment on Count III would have been premature.

petition in this case be granted, the judgment of the court of appeals panel be vacated as to Count III of the indictment, and the case be remanded for further consideration in light of *Smith*.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, we suggest that the Court grant the petition, vacate the judgment of the court of appeals panel as to Count III of the indictment, and remand for further consideration in light of *Smith* v. *United States*, 113 S. Ct. 2050 (1993).

Respectfully submitted.

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